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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

POINT PILLAR PROJECT DEVELOPERS, LLC, Plaintiff and Appellant, v. HOME DEPOT U.S.A. INC., et al., Defendants and Respondents.	A150148 (San Mateo County Super. Ct. No. CIV 527225)

Point Pillar Project Developers, LLC ("Point Pillar") built a hotel using Advantage wood products distributed by Kelleher Corporation (Kelleher) and sold by Home Depot U.S.A. (Home Depot) (collectively "Defendants"). Within six months of installation, deterioration appeared in wood used for the exterior trim. After 18 months, there was peeling, flaking, and a general weakening of the wood. In March 2009, Point Pillar first contacted Home Depot about the damage.

On March 7, 2014, Point Pillar sued Defendants for damages resulting from use of the defective wood. Point Pillar amended its complaint in October 2015 to add claims for breach of warranty and fraud after its wood expert issued a report on the causes of the deterioration. Defendants were granted summary judgment on the ground that all causes of action were barred by the applicable statutes of limitation. We affirm the judgment.

BACKGROUND

Around 2007, Point Pillar developed the Oceano Hotel & Spa near Half Moon Bay. Keet Nerhan was the project's general contractor, and Ronald Stefanick the

construction supervisor. For the hotel's exterior trim, Point Pillar used Advantage wood products distributed by Kelleher and sold by Home Depot. In February 2007, Home Depot made its last delivery of Advantage wood to Point Pillar.

In November 2007, Stefanick began to see deterioration in the Advantage wood used in decks and room balconies. There was "cracking" and "minor softness" in the baseboards and "damage happening at the ends of the boards." About six months after the Advantage wood was installed, Nerhan was told by a hotel employee the wood trim was deteriorating. When Stefanick inspected it, he found more than one spot where the wood was "going soft."

Nerhan instructed Stefanick to contact Home Depot. In March 2009, Stefanick contacted Dina Ricci, a Home Depot account representative, to report that Point Pillar had "a major problem developing with the exterior wood trim" of the hotel and invited Home Depot to come and look. According to Stefanick, "Starting in May of 2009, the damage was getting so extensive that we could not rent the rooms, because they were unsafe. And at that point in time in order to put the rooms back in service I started to replace the railings, deck railings."

When Ricci first visited the hotel at some point before August 2009, Stefanick pointed out approximately nine decks in different phases of deterioration. Ricci observed "rot happening."

On March 9, 2010, Point Pillar sent an email to Home Depot discussing the Advantage wood that had been incorporated into the decks of almost every hotel room. The email stated: "Deterioration appeared within 6 months. After about a year and a half there was peeling, flaking, and a general weakening of the product wherever it was in use. The faulty decks have been inspected by both your contractor service supervisor and by [Kelleher]. No action has been taken by either to remedy the situation. It has been several weeks, now."[1]

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[1] Point Pillar objected to several of these facts as speculative or lacking foundation. However, the trial court overruled the objections. Point Pillar does not contest those

On March 7, 2014, Point Pillar sued Defendants for damages arising from the defects. In mid-2015, Point Pillar's wood expert issued a report opining that the premature deterioration in the Advantage was caused in part because the wood was not treated with any preservative. On October 1, 2015, Point Pillar filed an amended complaint adding causes of action based on alleged performance warranties and other representations Defendants made about the wood. The first three causes of action for breach of warranty, breach of implied warranty of merchantability, and breach of warranty and fitness were asserted against both Home Depot and Kelleher. The fourth and final cause of action for fraud was asserted against only Kelleher.

Defendants jointly moved for summary judgment on the ground that Point Pillar's amended complaint was barred by the statute of limitations. The trial court granted Defendants' motion. Point Pillar appeals from that order.

DISCUSSION

Standard of Review

The standard of review for summary judgment is well established. The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) "A moving defendant has met its burden of showing that a cause of action has no merit by establishing that one or more elements of a cause of action cannot be established or that there is a complete defense. [Citations.] We independently review an order granting summary judgment, viewing the evidence in the light most favorable to the nonmoving party." (*Gundogdu v. King Mai, Inc.* (2009) 171 Cal.App.4th 310, 313.)

The Applicable Statutes of Limitations Bar Point Pillar's Claims

Generally, a cause of action accrues for purposes of the statute of limitations, and the applicable limitations period begins to run, when the plaintiff has suffered damages

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rulings on appeal. Several of Defendants' undisputed facts were also disputed by Point Pillar but the cited evidence did not controvert the basic fact offered.

from a wrongful act. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) " 'Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her [or his] injury was caused by wrongdoing, that someone has done something wrong to her [or him]. . . . [T]he limitations period begins once the plaintiff " ' "has notice or information of circumstances to put a reasonable person on inquiry. . . ." ' " [Citations.] A plaintiff need not be aware of the specific "facts" necessary to establish the claim; that is a process contemplated by pretrial discovery. Once the plaintiff has a suspicion of wrongdoing, and therefore an incentive to sue, she must decide whether to file suit or sit on her rights. So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her.' " (*Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 642-643 (*Mills*).)

The operative complaint asserts three breach of warranty claims and one fraud claim. There is no dispute that the applicable statute of limitations for breach of warranty claims is four years. (Cal. U. Com. Code § 2725, subd. (1).) Nor is there any disagreement that the statute of limitations for a fraud claim is three years. (Code Civ. Proc., § 338, subd. (d).) Thus, subject to tolling or estoppel, Point Pillar was required to bring its breach of warranty claims within four years from of their accrual and the fraud claim within three years.

We agree with the trial court that Point Pillar did not timely assert its claims. Based on undisputed facts, Point Pillar's construction supervisor, Stefanick, observed deterioration in the Advantage wood installed at the hotel as early as November 2007. Nerhan, the general contractor, was told of the deterioration six months after installation. Eighteen months after installation, there was peeling, flaking, and a general weakening of the wood wherever it was used. In March 2009, the problem was significant enough that Stefanick contacted Home Depot to requested a visit from the retailer because there was "a major problem developing with the exterior wood trim." By May 2009, the damage was so extensive the hotel could not rent some rooms due to safety concerns, and certain balcony railings were replaced. Thus, by May 2009, Point Pillar suspected or should have suspected wrongdoing, and its claims had accrued. Because it waited to sue until

March 2014—nearly five years later—the trial court properly concluded the claims were untimely and granted Defendants summary judgment.

Point Pillar contends the applicable statutes of limitations were delayed based on the discovery rule that applies in cases involving latent defects. Citing *Leaf v. City of San Mateo* (1980) 104 Cal.App.3d 398 (*Leaf*), Point Pillar argues its claims did not accrue until the plaintiff could have discovered the injury and its cause through the exercise of reasonable diligence. According to Point Pillar, the injury was the absence of treatment in the wood notwithstanding Defendants' representations that the wood was resistant to fungal damage, rot, and insects. Point Pillar says it was only able to discover the injury when its wood expert provided the report attributing the premature deterioration to the lack of any wood treatment. We disagree.

This was not a case that presented latent defects but instead involved obvious damage that manifested itself just months after the wood was installed. In November 2007, the wood showed cracking and softness and was visibly deteriorating. In March 2009, Point Pillar conveyed to Home Depot it had a "major problem developing" with the Advantage wood used for the hotel's trim. By May 2009, rooms were pulled from service because damage to the balconies presented safety concerns. At that point, some wood was "rotted at the base" and others were at the point of "falling off" such that they had to be replaced to return rooms to service. These obvious problems placed Point Pillar on notice that something was wrong and triggered its duty to inquire further, especially since the problems appeared within two years of an alleged 30-year warranty. Even if Point Pillar did not discover the cause of the damage between 2007 and 2009, its suspicion that something was wrong triggered the limitation periods. "If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation.' " (*McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 108.) The accrual of a cause of action is not delayed until a plaintiff has figured out why the wrong happened. (See *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 286-287.)

Leaf is distinguishable. In *Leaf*, the plaintiffs sued the defendant City of San Mateo for creating a subterranean water channel under their property by improperly maintaining the city's sewer trenches. (*Leaf, supra*, 104 Cal.App.3d at p. 404.) The plaintiffs had originally sued the developer/builder of the property based on a belief that it was responsible for a subsurface drainage problem. When the plaintiffs began excavation of the property following settlement of the lawsuit, a cave-in occurred, revealing the sewer problem. (*Id.* at p. 403.) The plaintiffs then sued the city. (*Id.* at p. 404.) The Court of Appeal held that the action was not barred by the statute of limitations because the plaintiffs had used reasonable diligence to discover the cause of the injury. "We see no reason to commence the running of the statute of limitations when plaintiffs, at the outset, made reasonable, but unsuccessful, efforts to identify the negligent cause of damage. Where, as in this case, plaintiffs consulted with professional engineers as to the source of their injury, they were entitled to rely upon that advice." (*Id.* at p. 408.)

Leaf is inapposite primarily for two reasons. The alleged deficiencies in the Advantage wood were obvious upon visual inspection. They were not "latent" defects. (Compare Code Civ. Proc., § 337.1, subd. (e) [patent defects] with Code Civ. Proc., § 337.15, subd. (b) [latent defects].) Moreover, in contrast to the *Leaf* plaintiffs, there was no evidence Point Pillar promptly sought to determine the reasons for the deterioration in the Advantage wood just a couple of years following its installation. Instead, Point Pillar stood by for years waiting for Defendants to address the problems, even while it was taking rooms out of service and conducting repairs.

The Future Performance Exception Does Not Save Breach of Warranty Claims

The future performance exception to the four-year statute of limitations for breach of warranty claims is set forth in California Uniform Commercial Code section 2725, subdivision 2, which establishes accrual for a breach of warranty claim "when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."' (Cal. U.

Comm. Code § 2725, subd. (2).) For its breach of warranty claims, Point Pillar invokes the future performance exception.

Even if we assume Defendants warranted the Advantage wood would perform for 30 years and the future performance exception was triggered, Point Pillar's claims would still not be timely. The future performance exception merely shifts the accrual date from "when tender of delivery is made" to "when the breach is or should have been discovered." (Cal. U. Comm. Code § 2725, § (2).) Here, that means the four-year limitations period for the warranty claims would not start on February 2007, when Home Depot made its last delivery of Advantage wood. Instead, the limitations period would begin when Point Pillar discovered or should have discovered the Advantage wood was not performing as warranted. As we have discussed, that occurred by May 2009. From that point, Point Pillar had four years to investigate the matter further and file suit. However, it waited until March 2014 and its wood scientist's investigation did not take place until 2015 during pre-trial discovery. This was too late.

Code of Civil Procedure Section 338 Does Not Delay Accrual of the Fraud Claim

Point Pillar also makes another delayed discovery argument specific to its fraud claim. It contends "[t]he cause of action for fraud did not accrue until [Point Pillar] discovered that [Defendants] had made misrepresentations about and concealed the true nature of the product sold," which Point Pillar says it only discovered when it received its wood expert's report.

Code of Civil Procedure section 338, subdivision (d), which establishes the three-year limitations period for fraud actions, also provides: "The cause of action in [a fraud] case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Cod. Civ. Proc., § 338 subd. (d).) "[W]e have long interpreted [this provision] to commence upon the discovery of the aggrieved party of the fraud *or* facts that would lead a reasonably prudent person to *suspect* fraud." (*Debro v. Los Angeles Raiders* (2001) 92 Cal.App.4th 940, 950.) When wood products allegedly warranted for 30 years were visibly failing within 18 months, a reasonably prudent person would have had sufficient information to suspect fraud in the product

representations. Accordingly, Code of Civil Procedure section 338, subdivision (d) does not lead to a different result.

Equitable Estoppel Does Not Bar Statute of Limitations Defense

"A defendant will be estopped to assert the statute of limitations if the defendant's conduct, relied on by the plaintiff, has induced the plaintiff to postpone filing the action until after the statute has run. [Citation.] ' "One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought." ' [Citation.] [¶] 'It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.]' [Citation.] ' "To create an equitable estoppel, 'it is enough if the party has been induced to *refrain* from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.' [Citation.]" [Citation.] [¶] In the usual case, estoppel is a question of fact to be resolved by the trier of facts. However, when "the facts are undisputed, the existence of an estoppel is a question of law." (*Mills, supra*, 108 Cal.App.4th at p. 652.)

Point Pillar contends there is an issue of material fact as to whether Defendants should be estopped from asserting their statute of limitations defense. It argues Defendants "made an inspection, took samples, and promised to test the samples and report back to Point Pillar," which "misled" and "lulled Point Pillar into a false sense of security." Point Pillar says Home Depot "should not benefit from their misrepresentations and false promises to analyze the product and report to [Point Pillar]."

As an initial matter, Point Pillar has forfeited this argument. It never asserted the theory in opposition to Defendants' summary judgment motion or even mentioned it during argument on the motion. (See *Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1013.) While Point Pillar argued some warranty-related facts which it has incorporated into its current estoppel argument, those generalized arguments

regarding unfairness do not put the trial court on notice that it should make findings on estoppel. (See *In re Marriage of Turkanis & Price* (2013) 213 Cal.App.4th 332, 353.) To permit a party to raise a new issue in connection with an appeal would be unfair to the trial court and manifestly unjust to the opposing party. (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29.)

Even if it had been argued in the trial court, estoppel would fail. There is no evidence to support Point Pillar's repeated claims that Defendants "promised" any response to its complaints. The evidence cited in support of such a promise is Nerhan's testimony explaining that "a few guys walked around with [Stefanick] and looked at [the] product, [said] yes, we'll get back to you, and then they – what my understanding is, they hired a consultant to take a look at it, and all this went on between [Stefanick] and Home Depot ¶. . . ¶ [s]everal times." There was no promise to repair or replace the damaged boards that would have reasonably induced a plaintiff to delay filing suit. The exchanges between Stefanick and Home Depot that took place "several times" and never reached a resolution satisfactory to Point Pillar for several years following its complaints underscores there was no promise or any other conduct that reasonably induced Pillar Point to refrain from filing suit.

Point Pillar says the 30-year warranty and Defendants' various representations about the quality of the Advantage wood amounted to a promise underlying its estoppel argument. Not so. Any warranty and such statements were issued at the time of sale before Point Pillar discovered problems with the Advantage wood. At that point, there was no threat of litigation. The warranty could not have reasonably induced Point Pillar to delay a lawsuit and cannot serve as the basis for estoppel.

Also, equitable estoppel only applies if "plaintiff proceeds diligently once the truth is discovered." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384.) Undisputed facts reveal Point Pillar moved with no such diligence. Point Pillar knew of problems with the Advantage wood as early as November 2007. By May 2009, the problems were significant enough that Point Pillar contacted Home Depot and took rooms out of service. Point Pillar offered no issues of disputed fact regarding any efforts at resolving the

dispute after April 2010. Indeed, Point Pillar acknowledges it was "ignored" by Home Depot after an April 2010 inspection. Nevertheless, Point Pillar delayed almost five years after the problems with the wood were appreciable enough that Home Depot had to be contacted, rooms had be shuttered, and railings replaced until it filed suit in March 2014. In these circumstances, equity does not require Defendants be estopped from asserting the statute of limitations.

Defendants' Non-Response to Point Pillar's Undisputed Facts

Finally, Point Pillar argues Defendants' summary judgment motion should not have been granted because Defendants failed to respond to the 62 additional disputed facts Point Pillar offered opposing summary judgment. Point Pillar contends the lack of response to these additional facts and the trial court's failure to recognize them as disputed constituted prejudicial error. We disagree.

As our analysis explains, Defendants met their initial burden under Code of Civil Procedure section 437c, subdivision (p)(2) to establish Point Pillar's claims were barred by the statute of limitations based on the undisputed material facts presented in their moving papers. Point Pillar's additional facts did not controvert the key facts supporting Defendants' statute of limitations defense, or otherwise create triable issues of fact regarding the running of the statute of limitations. The absence of a reply did not affect the ruling on summary judgment.

DISPOSITION

The summary judgment is affirmed.

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Siggins, P.J.

We concur:

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Jenkins, J.

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Fujisaki, J.